Draft

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KANSAS

Civil Action No.

RICHARD CASE NAGELL, A-83286-L,
Petitioner,
Vs.
WARDEN, U.S. PENITENTIARY, LEAVENWORTH, KANSAS, and UNITED STATES ATTORNEY GENERAL, et al,
Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

COMES the petitioner, a prisoner in custody of the United States Attorney General, who, by his own counsel, would respectfully allege and show that the conviction and sentence pursuant to which he is being detained was imposed in violation of the FOURTH AMENDMENT, the Due Process clause and the Self-Incriminatory provisions of the FIFTH AMENDMENT, and the SIXTH AMENDMENT to the United States Constitution.

The facts and circumstances showing these constitutional violations, and all pertinent data required by the United States District Court, Eastern District of Kansas, to consider this petition are set forth as follows and in the Supporting Memorandum attached hereto:

1. Petitioner is presently detained at the U.S. Penitentiary, Leavenworth, Kansas.

2. Sentence was imposed by the United States District Court, Western District of Texas, El Paso Division, at El Paso Texas.

3. The indictment number upon which the offense for which sentence was imposed is unknown. Petitioner was indicted in January 1964 (exact date unknown) for having entered a federally insured bank with intent to rob and of attempting to commit robbery in violation of Section 2113(a), Title 18, U.S.C.A. At his second trial on the merits, pursuant to which current sentence was imposed, the government elected to try petitioner on one count only of the indictment, that of "intent."

4. Current sentence was imposed on September 27, 1966. Petitioner was sentenced to the maximum penalty of five years in the custody of the United States Attorney General under the provisions of Section 4208(a)(2), Title 18, U.S.C.A.

5. A finding of guilty was made after a plea of not guilty.

6. The finding of guilty was made by a jury.

7. Initial judgement of conviction at the first trial on the merits was appealed to the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana (Criminal Action No. 21620), and reversed on January 4, 1966, with instructions that a new trial be granted. Purportedly, the current judgement of conviction is being appealed to the same court, but petitioner has not been apprised of any additional information with regard thereto.

8. The grounds on which petitioner bases his allegations that he is being held in custody unlawfully are set forth below:

(a) Suppression and withholding of evidence (see FIRST, THIRD, FIFTH, SIXTH, SEVENTH, ELEVENTH, FOURTEENTH, SIXTEENTH, TWENTY-FIRST, AND THIRTY-SECOND SPECIFIC ALLEGATION, attached Supporting Memorandum.

(b) Unreasonable seizures and confiscation of private property - defense evidence (see SIXTH SPECIFIC ALLEGATION, attached Supporting Memorandum).

(c) Denial of the effective assistance of court-appointed counsel (see FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, NINTH, ELEVENTH, TWELFTH, FOURTEENTH, FIFTEENTH, SIXTEENTH, SEVENTEENTH, EIGHTEENTH, TWENTY-FIRST, TWENTY-SECOND, TWENTY-FOURTH, TWENTY-SIXTH, TWENTY-SEVENTH, TWENTY-EIGHTH, TWENTY-NINTH, THIRTIETH, THIRTY-FIRST, THIRTY-SECOND, THIRTY-THIRD, THIRTY-FOURTH, AND THIRTY-FIFTH SPECIFIC ALLEGATION, and related General Allegations, attached Supporting Memorandum.

(d) Denial of the right to be represented and given unobstructed assistance by qualified and effective counsel (see TWENTY-THIRD SPECIFIC ALLEGATION and related General Allegations, attached Supporting Memorandum).

(e) Denial of the right to seek a change of venue (see TWENTY-SEVENTH SPECIFIC ALLEGATION and related General Allegations, attached Supporting Memorandum.

(f) Denial of the right to subpoena and obtain witnesses and evidence in favor of petitioner (see FIRST, SECOND, THIRD, FIFTH, SIXTH, SEVENTH, TENTH, ELEVENTH, SIXTEENTH, THIRTIETH, THIRTY-SECOND, and THIRTY-FOURTH SPECIFIC ALLEGATION, attached Supporting Memorandum).

(g) Denial of a speedy trial (see TWENTY-SECOND, TWENTY-SIXTH and TWENTY-EIGHTH SPECIFIC ALLEGATION and related General Allegations, attached Supporting Memorandum).

(h) Discrimination in the selection of the jury (see TWENTY-NINTH SPECIFIC ALLEGATION, attached Supporting Memorandum).

(i) Intimidation and coercion of petitioner (see SECOND, THIRTEENTH, FOURTEENTH, SEVENTEENTH, EIGHTEENTH, NINETEENTH, TWENTIETH, TWENTY-FOURTH, TWENTY-SIXTH, THIRTIETH, THIRTY-FIRST, THIRTY-SECOND and THIRTY-FIFTH SPECIFIC ALLEGATION and related General Allegations, attached Supporting Memorandum).

(j) Denial of the right to testify (see FOURTEENTH, ~~and~~ and THIRTIETH, THIRTY-FIRST SPECIFIC ALLEGATION and related General Allegations, attached Supporting Memorandum).

(k) The knowing use of perjured testimony and false and misleading evidence (see SIXTEENTH, SEVENTEENTH, TWENTY-FIRST, THIRTY-THIRD, THIRTY-FOURTH AND THIRTY-FIFTH SPECIFIC ALLEGATION, attached Supporting Memorandum).

(l) Petitioner compelled to be a witness against himself (see TWENTIETH, TWENTY-FOURTH and TWENTY-FIFTH SPECIFIC ALLEGATION and related General Allegations, attached Supporting Memorandum).

(m) Denial of a fair and impartial trial (see TWENTY-SEVENTH, TWENTY-NINTH, THIRTIETH, THIRTY-FIRST, THIRTY-SECOND, ~~and~~ THIRTY FOURTH, AND THIRTY-FIFTH SPECIFIC ALLEGATION, attached Supporting Memorandum).

(n) Deprivation of due process of law (see THIRTY-SIXTH SPECIFIC ALLEGATION, attached Supporting Memorandum).

9. The facts which support each of the grounds in 8 are reserved after each item, and are set forth as specific allegations in the attached Supporting Memorandum, in the same order.

10. Petitioner has not filed previous petitions for habeas corpus, motions under Section 2255, Title 28, U.S.C., or any other applications, petitions or

~~supplemental~~ motions with respect to this conviction.

11. Petitioner alleges remedy by motion to the sentencing court, or on appeal therefrom, would be inadequate and ineffective to test the legality of his detention in that:

(a) Sentencing court, through its order of April 7, 1966, has denied petitioner the lawful right to be represented and given unobstructed assistance by effective and qualified legal counsel; that such order is still in effect, was in effect ~~prior~~ long prior to and during the trial pursuant to which petitioner is currently convicted and sentenced, and was issued notwithstanding that such counsel was to have been retained by petitioner through his relatives and at their own expense; that such counsel was and is a lawyer in good standing with the State Bar of Texas, admitted to practice law before the federal bench of sentencing court (see TWENTY-SECOND and TWENTY-THIRD SPECIFIC ALLEGATIONS and preceding and subsequent ~~numbered~~ related general allegations, attached Supporting Memorandum).

(b) In consonance with the above, the sentencing court refuses to entertain any motion unless submitted by court-appointed counsel; that such court refuses to submit the type of motion to which petitioner is lawfully entitled to have submitted; that the sentencing court by its own record has well demonstrated it will not allow petitioner to seek redress or argue the merits of any cause in his own behalf, despite the fact he is not now, nor has he ever been, certified psychotic or insane by any medical authority or adjudicated mentally incompetent in a court of law, or otherwise adjudged in a court of law to be incapable of acting or assisting in his own defense (see EIGHTH, TWENTY-FIFTH, and TWENTY-SECOND SPECIFIC ALLEGATIONS and related general allegations, attached Supporting Memorandum).

(c) Sentencing court, by its instructions issued on April 20, 1964 and April 7, 1966, unlawfully coerced petitioner to accept, cooperate in, and abide by a defense which was then and ever later contrary and repugnant to the truth and inconsistent with and opposed to the facts in his case; that such defense was ineffective and inadequate and not only resulted in convictions of petitioner at both trials on the merits, but also caused a continuing lack of due process

in the sentencing court and on appeal from to the appelate court; that through intimidation and coercion of court-appointed counsel and a lack of corrective process in the sentencing court, petitioner was then and ever later prevented from seeking remedy to the appelate court (see TWELFTH, THIRTEENTH, FOURTEENTH, TWENTY-FIRST, TWENTY-SECOND, TWENTY-THIRD, THIRTIETH, THIRTY-FIRST and THIRTY-FIFTH SPECIFIC ALLEGATIONS and related general allegations, attached Supporting Memorandum).

(d) The foregoing premises having been considered, it is further alleged by the facts cited throughout the attached Supporting Memorandum that there exists an absence of corrective process in the sentencing court; that the circumstances prevailing in petitioner's case since before and after his current conviction surely depict failure of the sentencing court to protect his rights; and that by all of the foregoing, petitioner is and has been barred from seeking adequate and effective remedy by appeal or motion to the appelate court, even if he were permitted to try.

12. No grounds or contentions set forth herein have been previously presented to this or any other federal court by way of petition for habeas corpus, motion under Section 2255, Title 28, United States Code, or any other petition, motion or application.

13. Petitioner was represented at his arraignments, pleas, trials and sentencings by the following court-appointed attorneys:

(a) Mr. Joseph A. Calamia, Suite 1134 Southwest National Bank Building, El Paso, Texas, 79901.

(b) Mr. Gus Gallo, same address.

WHEREFORE, this petition considered in its entirety, petitioner respectfully moves and prays that this Honorable Court:

WILL, in due course, order petitioner to be produced before this court and permit him and other witnesses to testify and offer evidence substantiating his allegations.

WILL, since he is indigent, allow petitioner to proceed in this cause in forma pauperis (Affidavit of Poverty attached) and for he represented by qualified and effective counsel of his own choosing, at no expense to the government.

WILL, in petitioner's behalf, cause to be issued subpoenaes and subpoenaes duces tecum for witnesses, respondents and records to be described.

SO PETITIONER EVER WILL PRAY.

Richard C. Nagell
Signature of Petitioner

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RICHARD CASE NAGELL, being first duly sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

Richard C. Nagell
Signature of Affiant

SUBSCRIBED and SWORN to before me this 6th day of June, 1967.
(Month) (Year)

William R. Martin
Notary Public
WILLIAM R. MARTIN
Notary Public, Parish of Orleans, State of La.
My Commission is issued for Life

My commission expires _____.
(Month, Day, Year)

FORMA PAUPERIS AFFIDAVIT

I, RICHARD CASE NAGELL, do herby swear that because of my poverty I am unable to pay the costs of said suit or action, that I am unable to give security for the same, and that I believe I am entitled to the redress I seek in said suit or action.

Richard C. Nagell
Signature of Petitioner

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RICHARD CASE NAGELL, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

Richard C. Nagell
Signature of Affiant

SUBSCRIBED and SWORN to before me this 6th day of January, 1967.
(Month) (Year)

William R. Martin
Notary WILLIAM R. MARTIN
Notary Public, Parish of Orleans, State of La.
My Commission is issued for life.

My commission expires _____
(Month, Day, Year)